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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
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09/782,151

02/14/2001

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26884 7590 04/30/2008
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EXAMINER

YIGDALL, MICHAEL J

ART UNIT

PAPER NUMBER

2192

MAIL DATE

DELIVERY MODE

04/30/2008

PAPER

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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte RALPH E. FRAZIER

Appeal 2007-3691
Application 09/782,151¹
Technology Center 2100

Decided: April 30, 2008

Before: JOSEPH L. DIXON, JAY P. LUCAS and STEPHEN C. SIU,
Administrative Patent Judges.

LUCAS, *Administrative Patent Judge.*

DECISION ON APPEAL
STATEMENT OF CASE

¹ Application filed February 14, 2001. The real party in interest is NCR Corporation.

Appellant appeals from a final rejection of claims 1 to 20 under authority of 35 U.S.C. § 134. The Board of Patent Appeals and Interferences (BPAI) has jurisdiction under 35 U.S.C. § 6(b).

Appellant's invention relates to a method and device for capturing scheduling information of tasks executed by a computer processor by using special capturing and recording software embedded right in the kernel of the computer processor's operating system. In the words of the Appellant:

In a computer system aspect, the capture of operating software scheduling information during execution of the operating software is performed using a computer system including a processor for receiving and transmitting data and a memory coupled to the processor. The memory has sequences of instructions stored which, when executed by the processor, cause the processor to invoke operating software scheduling information capture software, and to record operating software scheduling information. Further, in one embodiment, the operating software scheduling information capture software is internally processed on the processor. In another embodiment, the operating software scheduling information capture software is not a separate task scheduled by an operating software scheduler.

(Spec. pp. 4 – 5).

Claim 1 is exemplary:

1. A method of capturing operating software scheduling information during execution of operating software and recording said operating software scheduling information from within the operating software, the method comprising the steps of:

compiling operating software scheduling information capture software which is an integral part of the operating system, the operating software scheduling information capture software recording a history of operating software events as they occur, information

related to the history being organized and stored as operating software program scheduling information relating to interactions between the operating system software and each of the programs and tasks managed by the operating system software, the scheduling information including indications of relative priorities of programs and tasks, indications of transfers of control from lower priority to higher priority tasks and identification of tasks waiting for execution at the occurrence of each operating software event;

invoking operating software scheduling information capture;
and

recording operating software scheduling information while the operating software is executing, for relatively long duration storage in order to permit review of the scheduling information by a user, duration of storage being sufficient to allow data collected during an operating session to be retrieved and used after termination of the session.

The prior art relied upon by the Examiner in rejecting the claims on appeal is:

Farrell	U.S. 5,247,675	Sep. 21, 1993
Barritz	U.S. 5,590,056	Dec. 31, 1996
Yamagishi	U.S. 5,870,604	Feb. 9, 1999
Bishop	U.S. 6,049,798	Apr. 11, 2000
O'Brien	U.S. 6,795,809 B2	Sep. 21, 2004

Rejections:

R1: Claims 1 and 3 to 17 stand rejected under 35 U.S.C. § 103(a) for being obvious over Bishop, in view of Barritz, in view of Farrell, and further in view of Yamagishi.

R2: Claims 2 and 18 to 20 stand rejected under 35 U.S.C. § 103(a) for being obvious over Bishop, in view of Barritz, in view of Farrell, in view of Yamagishi, and further in view of O'Brien.

Appellant contends that the claimed subject matter is not rendered obvious by Bishop in combination with the other references for failure of the combination to teach the claimed limitations, and for improper combining of the references. The Examiner contends that each of the claims is properly rejected.

Rather than repeat the arguments of Appellant or the Examiner, we make reference to the Brief and the Answer for their respective details. Only those arguments actually made by Appellant have been considered in this opinion. Arguments which Appellant could have made but chose not to make in the Brief have not been considered and are deemed to be waived. *See* 37 C.F.R. § 41.37(c)(1)(vii) (2004).²

We affirm the rejections.

ISSUE

The issue is whether Appellant has shown that the Examiner erred in rejecting the claims under 35 U.S.C. § 103(a). The issue turns on whether the references teach the storing of operating software scheduling information and other limitations, and whether the references can be rightfully combined in the rejections.

² Appellant has not presented any substantive arguments directed separately to the patentability of the dependent claims or related claims in each group, except as will be noted in this opinion. In the absence of a separate argument with respect to those claims, they stand or fall with the representative independent claim. *See In re Young*, 927 F.2d 588, 590 (Fed. Cir. 1991).

PRINCIPLES OF LAW

Appellants have the burden on appeal to the Board to demonstrate error in the Examiner's position. *See In re Kahn*, 441 F.3d 977, 985-86 (Fed. Cir. 2006) ("On appeal to the Board, an applicant can overcome a rejection [under § 103] by showing insufficient evidence of *prima facie* obviousness or by rebutting the *prima facie* case with evidence of secondary indicia of nonobviousness.") (quoting *In re Rouffet*, 149 F.3d 1350, 1355 (Fed. Cir. 1998)).

"To reject claims in an application under section 103, an examiner must show an unrebutted *prima facie* case of obviousness. ... On appeal to the Board, an applicant can overcome a rejection by showing insufficient evidence of *prima facie* obviousness or by rebutting the *prima facie* case with evidence of secondary indicia of nonobviousness." [citations removed] *In re Rouffet*, 149 F.3d at 1355 (Fed. Cir. 1998)

References within the statutory terms of 35 U.S.C. § 103 qualify as prior art for an obviousness determination only when analogous to the claimed invention. *In re Clay*, 966 F.2d 656, 658 (Fed. Cir. 1992). Two separate tests define the scope of analogous prior art: (1) whether the art is from the same field of endeavor, regardless of the problem addressed and, (2) if the reference is not within the field of the inventor's endeavor, whether the reference still is reasonably pertinent to the particular problem with which the inventor is involved. *In re Deminski*, 796 F.2d 436, 442 (Fed. Cir. 1986); see also *In re Wood*, 599 F.2d 1032, 1036 (CCPA 1979) and *In re Bigio*, 381 F.3d 1320, 1325 (Fed. Cir. 2004). Furthermore, "there must be some articulated reasoning with some rational underpinning to support the legal conclusion of obviousness' . . . [H]owever, the analysis need not seek

out precise teachings directed to the specific subject matter of the challenged claim, for a court can take account of the inferences and creative steps that a person of ordinary skill in the art would employ.” *KSR Int’l v. Teleflex Inc.*, 127 S. Ct. 1727, 1741 (2007) (quoting *In re Kahn*, 441 F.3d 977, 988 (Fed. Cir. 2006)).

ANALYSIS

From our review of the administrative record, we find that the Examiner has presented a prima facie case for the rejections of Appellant’s claims under 35 U.S.C. § 103. The prima facie case is presented on pages 3 to 12 of the Examiner’s Answer.

Arguments with respect to claims 1 and 3 to 17

In opposition, Appellant presents a number of arguments. The first argument contends that Bishop “does not include a history of operating software events with information relating to the history being organized and stored as operating software program scheduling information.” (Br., p. 8).

In the Answer, the Examiner refers to a teaching of a history of events in a recorded information log. (Ans., p. 13, middle). The Examiner points to the bottom of column 6 of Barritz for the details of the teaching, and we find no error in the Examiner’s application of that art to the claims.

Appellant next contends that “Bishop does not indicate that the viewing period remains open past the termination of an operating session.” (Br., p. 8, middle). Later in the Brief, but relevant to the same point, Appellant charges “...but Farrell does not teach the relatively long term storage of scheduling information to permit review by a user....” (Br., p. 11).

The Examiner remarks for both of Appellant's arguments that Barritz presents the teaching at issue (Ans., p. 13, bottom; p. 16, top) and points to Barritz, column 8, line 43+. At that point Barritz indicates, "[i]n a preferred embodiment, reporting program 60 can, using the information stored in system configuration log 66 and recorded information log 62, produce output reports 64." As these are permanent reports, we can reasonably infer that they outlast the termination of the session, and we thus do not find error in the Examiner's application of this teaching.

Appellant next contends that the combination of Bishop and Barritz does not include in its reports "indication of relative priorities of programs and task, indications of transfers of control..., and identification of tasks waiting for execution." (Br., p. 9, middle, to p. 10).

The Examiner points to Farrell, Bishop and Yamagishi for these features. (Ans., p. 14, bottom). Examiner itemizes the spots in the references where these features are taught. (Id.) We do not find error in the Examiner's itemization of these features in the cited prior art.

Appellant mentions that Barritz and Bishop do not address the same concerns, and that their combination is not proper. (Br., p. 10, middle +). We treat this argument along with that presented by Appellant on page 12 of the Brief, addressing the same issue of the combination of teachings.

This argument goes to the basic combinability of the references. It is true that the Examiner's rejections have applied 4 or 5 references, and though each is from the field of monitoring the operation of a computer processor, each addresses a somewhat different aspect of the computer's functioning, and has a slightly different primary purpose. However, each

reference establishes that claimed features are old and well known in the art. “It is common sense that familiar items may have obvious uses beyond their primary purposes, and a person of ordinary skill often will be able to fit the teachings of multiple patents together like pieces of a puzzle.” *KSR Int’l Co. v. Teleflex, Inc.*, 127 S. Ct. at 1732 (2007). We thus find that the combination of these references, as indicated by the Examiner (see the Ans., p. 16) are properly combinable to teach the presence of the claims’ limitations in the prior art.

Appellant relies on the arguments above with respect to claims 15 and claims 3 to 14. (Br., p. 13). We find those arguments equally unpersuasive for the dependent claims listed.

*Arguments with respect to
claims 2 and 18 to 20*

With respect to claim 2, Appellant contends that O’Brien does not cure the deficiencies of Bishop, Barritz, Farrell and Yamagishi as references. (Br., p. 14). Not finding the combination of those references deficient, we cannot agree with Appellant’s contention.

The arguments with respect to claims 18, 19 and 20 are referred to the arguments above concerning long duration storage and priorities of programs. (Br., p. 14, 15). We do not find error in the Examiner’s rejection for the reasons explained above.

CONCLUSION OF LAW

Based on the findings of fact and analysis above, we conclude that the Examiner did not err in rejecting claims 1 to 20 under 35 U.S.C. § 103(a) as expressed in R1 and R2 above.

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DECISION

The Examiner's rejection of claims 1 to 20 is affirmed.

AFFIRMED

pgc

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